The district judge should also have asked himself the further question as to what effect these letters and the refreshment of his memory from his statement to the police had on the truthfulness and reliability of the accomplice and on the accuracy of his recollection of the incidents which actually occurred on the day of the kidnapping.

Not one question seems to have been asked of the accomplice relating to what effect these letters had on him or what he thought he was being asked to do.

The whole case depended on the slender thread of evidence relating to the telephone call which, as I have said, merely tended to prove abetment of kidnapping. But for this tenuous evidence there was nothing in the evidence of the accomplice to implicate the appellant in any way. If the prosecution relied on common intention on the part of both the appellant and the accomplice to kidnap the boy it was incumbent on them to allege and prove this common intention by showing that it existed at least at the time the accomplice picked up the appellant in his car that morning and that it continued right up to the time the car met with the accident after the boy had been taken from the school by the accomplice. The mere presence of the appellant in the car *after* the boy had been kidnapped from the school by the accomplice was not a circumstance which, standing alone, amounted to even abetment of the offence and was accordingly not corroboration of the substantive offence of kidnapping as the district judge held.

On the one hand, the prosecution contention was that by his letters to the accomplice in prison the appellant was practically prevailing on him to give false evidence in order to exonerate him. The letters, however, are couched in language which does not necessarily drive one to that conclusion alone. They could equally well be regarded as exhortations to speak the truth though one may strongly suspect that, reading between the lines, something more was expected of the accomplice. They are not self-implicating statements or confessions *simpliciter.*

As I have said, one does not know what effect these letters had on the mind of the accomplice when he came to give evidence. He was not asked anything about this.

On the other hand, it is clear from A.S.P. Lim Boh Tan's evidence that the accomplice had had the statement made by him to the police read over to him, and parts of it probably several times. Having regard to the principles which emerge from the Hong Kong and Indian cases cited earlier, one cannot be sure whether the accomplice was giving evidence of what he had previously said or whether he was giving evidence of what he actually recollected. One cannot also be sure what effect the appellant's letters had on his recollection or veracity. The evidence of the accomplice was, to say the least, far from satisfactory.

The district judge did not consider these matters and I am not satisfied that he applied the correct tests in evaluating his evidence. The appellant, in my judgment, should not have been called on to enter upon his defence.

In view of this, it seems unnecessary for me to express any firm opinion on the ground relating to lack of jurisdiction.

The appeal is allowed, the conviction quashed and the sentence of 3 years' imprisonment set aside.

Appeal allowed.

Solicitors: *David Marshall.*

BP MALAYSIA SDN. BHD. v. LOW NAM HUI CO. LTD.

[O.C.J. (Abdul Hamid J.) April 13, 1970]

[Kuala Lumpur — Civil Suit No. 1842 of 1969]

Practice and Procedure — Particulars — Application by letter for further and better particulars — Whether such application prevents time for delivery of defence from running — R.S.C. 1957 O.19 r.7A — Whether proper case to exercise discretion.

Where on an application by letter for further and better particulars under R.S.C. O.19 r.7A, the application is refused, and no application is made for a judge's order for particulars and no defence is filed within the time limited for delivery of the defence, any judgment obtained in default of the defence, unless the contrary is shown, must be deemed to be regularly obtained.

Cases referred to:-

(1) *Soona Sanmugam* v. *Wee Teow Beng & Anor.* [1932] S.S.L.R. 91.

(2) *Evans* v. *Bartlam* [1937] A.C. 473.

CIVIL SUIT.

Liew Shou Kong for the plaintiffs.

L. M. Ong for the defendants.

Abdul Hamid J.: This is an application by the defendants for an order to set aside judgment in default of defence entered against the defendants on 29th November 1969.

The writ of summons and the statement of claim were served on the defendants on 1st November 1969. They filed the memorandum and notice of appearance on 6th November 1969. On 5th November 1969, the defendants' solicitors applied for further and better particulars. By letter dated 24th November 1969, the plaintiffs' solicitors wrote to the defendants' solicitors drawing their attention to rule 7B of Order 19 of the Rules of the Supreme Court, stating that the request for particulars at that stage was premature. They also warned that they were proceeding to enter judgment in default of defence at the expiry of the time for defence.

The defendants' solicitors by letter dated 25th November 1969 informed the plaintiffs' solicitors that they would file an application in court for an order for further and better particulars. An application was forwarded to the senior assistant registrar, Kuala Lumpur on 2nd December 1969. The senior assistant registrar informed the defendants' solicitors that judg-

ment in default of defence had been entered on 29th November 1969.

The affidavit affirmed by Liew Kuet Hin, manager of the defendant company, stated that the judgment was entered while they were preparing to file an application for an order for further and better particulars and the plaintiffs' solicitors were aware of this. And that these particulars were necessary to enable the defendants to file their defence.

The plaintiffs in their affidavit contend that the defendants are not entitled to the particulars asked for. It was the practice of the plaintiffs to give their customers at the time of delivery of the goods, an invoice stating the nature, quantity, price per unit and delivery price, of goods then delivered. Again at the end of the month, a monthly statement was prepared. stating reference to invoice, quantity and costs of goods delivered during the month and payments received during the same month.

The application was adjourned to open court for hearing. Mr. L. M. Ong, counsel for the defendants argued that judgment in default was premature and that at the time when judgment was entered, time for delivery of the defence had not run out or expired. He submitted that time runs from the time the plaintiffs' solicitors refused to furnish the particulars. He cited the case of *Soona Sanmugam* v. *Wee Teow Beng & Anor*,[1] where it was held that —

"Order XIX, Rule 7A, of the English Rules of the Supreme Court, has effect in the Colony by virtue of s. 3 of the Civil Procedure Code. It enables a party to a suit to apply by letter for particulars before resorting to a summons. A request for particulars by letter is not complied with until all the particulars are given. The time for the next subsequent pleading runs from the date on which all the particulars required have been given."

In that case, the particulars were delivered. The learned judge considered the effect of the delivery of particulars on request by letter in the light of section 241 of the Civil Procedure Code, which is similar to the existing rule 8 Order 19 of our Rules of the Supreme Court which reads —

"The party at whose instance particulars have been delivered under a judge's order, shall unless the order otherwise provides, have the same length of time for pleading after the delivery of the particulars that he had at the return of the summons."

Murison C.J. at pp.93 and 94 said —

"... It would appear, therefore that rule 7A of the Rules of the Supreme Court is applicable in the Colony, so that an application for particulars by letter is to be treated in the same way as an order for particulars made by a judge under section 241 of the Code."

It is clear from the judgment that when his Lordship referred to "an application for particulars by letter" he was in effect referring to an application which had been complied with. In the present case, however, the application for particulars by letter was refused. That being the case, the principles laid down in *Soona Sanmugam, supra*, have to be viewed in the light of that distinction.

Rule 8 of Order 19 apparently is not intended to operate, unless the order otherwise provides, as a stay of proceedings or to give any extension of time. The intention, I think, is to confer on the party at whose instance *particulars have been delivered* at a judge's order (or when delivered on application by letter under rule 7A), the same length of time for pleading after delivery of the particulars that he had at the return of the summons. Consequently —

"... The time for the next subsequent pleading runs from the date on which all particulars required have been given." *(Soona Sanmugam, supra).*

Where on an application by letter for further and better particulars under rule 7A Order 19, the application is refused, and no application is made for a judge's order for particulars and no defence is filed within the time limited for delivery of the defence, any judgment obtained in default of the defence, unless the contrary is shown, must be deemed to be regularly obtained. Having regard to the circumstances of this particular case, I am satisfied that the judgment in default was regular and that at the time when such judgment was entered, the time for delivery of defence had expired.

The only other remaining question for me to consider in this case is whether this is a proper case for me to exercise my discretion and set aside the judgment in default. In exercising the discretion, the court follows certain determined and well-defined principles. Lord Atkin, in *Evans* v. *Bartlam*[2] at page 480 said —

"... The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence."

In the instant case, the judgment in default of defence having been regularly obtained, the court has to consider whether the applicant has produced evidence to show that he has a *prime facie* defence. The affidavit affirmed in support of this application has not disclosed any evidence that the defendants on the merits have a *prima facie* defence.

For these reasons, I dismiss the application with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok*; *L. M. Ong.*

PUBLIC PROSECUTOR v. WAN RAZALI KASSIM

[F.C. (Azmi L.P., Ismail Khan C.J. (Borneo) & Lee Hun Hoe J.) April 16, 1970]

[Kuching — Federal Court Criminal Appeal No. X.2 of 1969]

Criminal Law and Procedure — Appeal — Whether appellate court should interfere with finding of fact by lower court.

The Public Prosecutor referred to the Federal Court the following question under section 66(2) of the Courts of Judicature Act, 1964,

"If a magistrate, without misdirecting himself, has made a finding of fact based on actual evidence before him, which finding of fact is corroborated in material particulars by inferences reasonably and properly drawn